SUPREME COURT, U. S.

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No. 540

In the Supreme Court of the United States

OCTOBER TERM, 1961

WEB CRAFTERS, PAPER EMPLOYEES' INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD; LAWRENCE EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEAL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; HERBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; WESTERN AIR LINES, INC., SECOND OFFICERS' ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS NATIONAL MEDIATION BOARD, EDWARDS, O'NEAL AND BOYD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 540

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL–CIO, PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL MEDIATION BOARD; FRANCIS A. O'NEILL, JR., INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; ROBERT O. BOYD, INDIVIDUALLY AND AS MEMBER OF THE NATIONAL MEDIATION BOARD; WESTERN AIR LINES, INC., SECOND OFFICERS' ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS NATIONAL MEDIATION BOARD, EDWARDS, O'NEILL AND BOYD IN OPPOSITION

This petition seeks a writ of certiorari prior to judgment in the court of appeals. The case raises the issue whether a National Mediation Board determination under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. 152, Ninth, with respect to employee eligibility to vote in a representation election is subject to

judicial review.[1] This issue of "imperative public importance," petitioner asserts, is similar to that presented in No. 531, *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board,* in which a petition for a writ of certiorari is now pending, and warrants concurrent consideration of the cases (Pet. 2–3).

To the extent this case raises a question concerning the availability or scope of judicial review presented in No. 531, the government opposes the petition on the grounds set forth in its brief in opposition filed today in that case. Petitioner's attack is upon the Board's determination of employees eligible to participate in a representation election. Section 2, Ninth, of the Railway Labor Act expressly imposes upon the Board the duty of making this determination. The non-reviewability of its action pursuant thereto is well settled. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, and cases cited at pages 9–10 of the government's brief in opposition in No. 531. Should the Court deny certiorari in No. 531, *a fortiori* the instant petition should be denied.

There are additional compelling reasons for rejecting this petition. It fails wholly to make the showing required by Rule 20 "that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require imme-

[1] The election has been held and the Board has certified the respondent Second Officers Association (SOA) as the appropriate bargaining agent for flight engineers employed by Western Airlines. Petitioner union, which lost the election, has unsuccessfully challenged the Board's determination in the district court but has not obtained a judgment in the court of appeals.

diate settlement in this court." There is no national emergency or threat to the country's safety, health or welfare. Cf. *Youngstown Co.* v. *Sawyer,* 343 U.S. 937, and other cases cited in Rule 20. Nor do *Bolling* v. *Sharpe,* 347 U.S. 497, and *Taylor* v. *McElroy,* 360 U.S. 709, cited by petitioner, warrant bypassing the court of appeals here. *Bolling* involved the constitutional issue of school segregation in the District of Columbia. The court invited the expedited petition for certiorari because the same question with respect to state schools was already before it on direct appeal under 28 U.S.C. 1253. *Taylor* is inapposite as the government did not oppose the granting of the petition. See Memorandum for the Respondents, p. 5, filed December 8, 1958, *Taylor* v. *McElroy, supra.*

The similarity between this case and No. 531 is limited to a common question concerning the availability of judicial review. The factual framework within which the issue arose here differs markedly and as a result petitioner advances several substantive contentions not present in No. 531, including allegations that the Board acted in violation of its rules (Pet. 3), that a hearing voluntarily afforded by the Board was inadequate (Pet. 3–4) and that the Board failed to comply with the requirements of the Railway Labor Act regarding allegations that respondent SOA union was employer-dominated (Pet. 11). While we do not believe that these contentions take the case out from under the rule of *Switchmen's Union,* the issues presented are distinct from those in No. 531. Under the circumstances, before the Court is asked to rule upon these different issues, it

should have the benefit of the judgment of the court of appeals. The petition should therefore be denied and petitioner left to follow normal appellate processes. Indeed, petitioner may expect that its constitutional claims will receive full review in the court of appeals, as did those of petitioner in No. 531 even though found insubstantial. *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board,* 294 F. 2d 905.

CONCLUSION

For the foregoing reasons, and those set forth in our brief in opposition in No. 531, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1961.